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Opinion

EDITORIAL

Please Stay, Justice Kennedy. America Needs You.

By The Editorial Board

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Lauren Simkin Berke

Dear Justice Kennedy,

As you have no doubt heard, rumors of your impending retirement are, for the second year in a row, echoing around Washington and across America. While you and your colleagues on the Supreme Court were listening to the final oral arguments of the term in recent days, those rumors were only growing more insistent.

How can we put this the right way? Please don't go.

Sitting between the four liberal justices and the four conservatives, you are the most powerful member of the most powerful court in the country, as you have been for at least a decade. Your vote, more than that of any other justice, has delivered landmark legal victories for Americans of all political stripes, from gays and lesbians seeking equal rights to African-American college students seeking a better education to deep-pocketed corporations seeking to spend more money influencing politics.

You have sent mixed signals about your intentions, but that hasn't stopped Republicans in Congress from referring to your departure as a done deal. (Of course, they said the same thing last year.) They smell blood — if they can install another rock-ribbed conservative like Neil Gorsuch, the court will have a locked-in right-wing majority for the rest of most of our lifetimes. They won't even have to steal a seat to do it.

Have past justices given a thought to politics when considering the timing of their exit from the court? Of course they have, whether or not they copped to it. But this moment is about so much more than partisan jockeying. We can't know what is in your heart, Your Honor, but we do know what your departure right now would mean for the court, and for the nation. It would not be good.

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There are two ways to think about this decision: The safeguarding of your legacy, and the safeguarding of the Supreme Court itself.

Start with the legacy. Across your 30 years on the court, your most important opinions — and there are many — have altered not just the lives of millions of Americans but the course of the nation's history. A sampling: Protecting reproductive rights, and saving Roe v. Wade from being essentially overturned, in 1992. Recognizing the equality and dignity of gays and lesbians multiple times since 1996 and, in 2015, granting same-sex couples the constitutional right to marry. Preserving the use of affirmative-action policies at public universities. And, in 2008, rejecting the executive branch's attempt to create a legal black hole at the Guantánamo Bay detention center, and giving the prisoners there the right to habeas corpus.

You've also recognized the continuing travesty of the nation's broken criminal justice system, voting to strike down excessive sentences for juveniles and the intellectually disabled and forcing states to shrink their overcrowded prisons.

Of course, part of your charm is that you're an equal-opportunity disappointer. In 2010, you wrote the majority opinion in the Citizens United case, which opened the floodgates to unlimited spending in political races by corporations and labor unions. In 2013, you signed on to an opinion — a deeply misguided one, we believe — that gutted the Voting Rights Act and allowed states across the country to make it harder for people, especially minorities, to vote. In the next two months, you may well upset liberals again by casting the deciding vote to uphold President Trump's travel ban, or in favor of the Christian baker who doesn't want to make cakes for same-sex weddings. At the same time, you would most likely be the key vote to rein in partisan gerrymandering, one of the most corrosive and anti-democratic

practices in modern America.

And none of us outside the court can know how much your mere presence affects which cases the justices choose to review — or not review.

Your record is more conservative than liberal, but there's no question that you are less of an ideologue than anyone President Trump would pick. How do we know? Look at his first nominee, Justice Gorsuch. Perhaps you were comforted by this choice — a well-qualified judge who clerked for you, and who would have been on any Republican's short list. But Justice Gorsuch has already made it clear that while he's a fan of individual liberty, at least in some cases, he is unlikely to go to great pains to protect your most cherished values — equality and human dignity. While a court with two Gorsuches would be quick to vote in favor of religious bakers, it would not be eager to broaden the constitutional rights of gays, lesbians and other vulnerable groups — let alone protect women seeking to control their own bodies.

Justice Gorsuch replaced Antonin Scalia, a move that didn't disrupt the balance of the court. Replacing you with a hard-line conservative, in contrast, would have enormous consequences for the nation's laws and Constitution for decades to come. Just ask Sandra Day O'Connor, your onetime fellow swing justice who left the court in 2006 and now watches helplessly as her replacement, the arch-conservative Samuel Alito Jr., votes to tear down her legacy.

As Justice O'Connor would tell you, legacy isn't only what you do when you're on the court; it's also the circumstances in which you leave it. To put it bluntly, did you spend a lifetime honoring and upholding the Constitution and the values of civility and decency in American public life only to have your replacement chosen by Donald Trump?

Do you want to give your seat to a president whose campaign and administration are under criminal investigation, whose closest aides have been indicted or have pleaded guilty to federal crimes? A president with so little regard for or understanding of the role of the judiciary, the separation of powers and the rule of law? A president who nominated to the federal bench someone who called you a "judicial prostitute"?

There is also the institutional legitimacy of and public respect for the nation's highest court, which we know you cherish even beyond your own legacy. Right now that legitimacy is eroding. The audacious decision by the Senate majority leader, Mitch McConnell, to hold a court seat hostage and use it as an electoral tool "places the court in a position of real institutional peril," as The Times's Linda Greenhouse wrote last year.

You know as well as anyone that the Supreme Court's authority depends on public confidence. When that fails, the consequences can be dire.

This is where you come in, Justice Kennedy. You're a conservative from a time when conservatism was a more or less coherent political philosophy, not a tribal identity. You're a believer in free markets and individual liberty, and also in human rights and equal justice. A defender of the rule of law, of civility and decorum — those

time-honored values now desecrated daily by the current inhabitant of the Oval Office.

In short, you're as close to a centrist as anyone on the current court, and so you, more than anyone, are in a position to protect its good standing. The American people are desperate for someone who is not polarizing, and your continued service would be an encouraging sign to them that the court can still operate outside politics. It could also be a model for future justices, though we're not holding our breath. If you leave, the dam breaks.

Now that Republicans have killed the filibuster for Supreme Court nominees, they've cleared the path for anyone the Federalist Society — pardon us, we meant President Trump — wants on the bench. Remember, the court has had a Republican-appointed majority since the early 1970s. If Mr. Trump gets the chance to fill your seat, it will be the most conservative court in nearly a century.

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We realize this isn't an entirely fair request. Every 81-year-old, especially those who have devoted their lives to the service of their country, should have the freedom to retire without worrying that the nation's future may hang in the balance. But this is the world we live in.

Mr. McConnell is probably correct that blocking President Barack Obama's third Supreme Court pick, Merrick Garland, was his biggest success as a politician, and that the possibility of another conservative on the court was the single most important factor in "bringing Republicans home" during the 2016 election. Yet he may find this was a Faustian bargain. By stealing the seat for short-term political advantage, Mr. McConnell has inflicted institutional damage from which the court, and the Senate, may never fully recover.

It's worth remembering that Mr. McConnell wouldn't have been in a position to pull off such a harmful stunt if more people had turned up to vote in the 2014 midterm elections. As it was, 64 percent of eligible voters stayed home — the worst showing in more than 70 years. A higher turnout could well have preserved the Democrats' Senate majority, meaning Judge Garland would now be Justice Garland, and your retirement would pose less of a danger to the legitimacy of the court.

Regardless, that's not what happened. This is your court, Justice Kennedy. It is facing an institutional crisis, and it needs you.

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